

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
ZASER AND LONGSTON, INC.)
AND DELLA HENRY,)
Appellants,)
v.)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
Respondent.)

PCHB Nos. 78-148 and 78-157

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the consolidated appeals from respondent's Orders of Cancellation of Ground Water Permits Nos. G3-22628 (QB-269), G3-22632 (QB-273), G3-22633 (QB-274), G3-22634 (QB-275), and G3-21893 (QB-175A), came before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, Chris Smith and David Akana (presiding) at a formal hearing in Seattle, Washington, on October 18, 1978.

Appellant was represented by its attorney, John R. Lewis; respondent was represented by Robert E. Mack, Assistant Attorney General.

DA/LB

1 Having heard the testimony, having examined the exhibits, and
2 having considered the contentions of the parties, the Board enters
3 these

4 FINDINGS OF FACT

5 I

6 Appellant, Zaser and Longston, Inc. (hereinafter "appellant") is
7 the owner or assignee (from Della Henry) of five permits to withdraw
8 artificially stored ground water in the Quincy Ground Water Subarea. Four
9 permits allow the withdrawal of water from and application of water upon
10 lands located in the NW 1/4 of Sec. 8, T. 18 N., R. 27 EWM in Grant
11 County. One permit allows the withdrawal of water from the NW 1/4
12 of Sec. 5, T. 18 N., R. 27 EWM for use upon the N 1/2 of Sec. 5
13 thereof, in Grant County.

14 II

15 Each permit, issued in March of 1975, included a development schedule
16 which indicated that the complete application of water was to be made by
17 March 11, 1978. Additionally, each permit contained the following provisio

- 18 . . . This permit is subject to termination
19 or modification, through issuance of supplemental
20 orders of the Department of Ecology, for good
cause, including but not limited to:
- 21 a. Violation of a permit condition;
 - 22 b. Obtaining a permit by misrepresentation
or failure to fully disclose all relevant
23 facts; and
 - 24 c. The receipt of new facts or information
that dictate that termination or modification
of this permit is necessary to comply with
the objectives of chapter 173-134 WAC.

25 11. The permittee shall apply the water to beneficial use

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hereunder within three years from the date of this permit or the same shall automatically terminate and be of no further force and effect.

Appellant accepted these permits as conditioned.

III

On Section 5 of its property, appellant drilled one well in 1974 and another in June of 1976, both of which were not productive. Two sprinkler circles were placed on the north half of Section 5 beginning in 1976. Crops were grown on the northwest quarter of Section 5 in 1977 and 1978 and on the northeast quarter of Section 5 in 1978 with water taken from two other wells (wells A and C on Exhibit No. A-2). In 1978, appellant began drilling a third well in the northwest quarter of Section 5. The total cost to appellant for the circles (\$48,000), the wells drilled (\$30,000), and preparation of land for farming (\$10,000) was about \$88,000.

On Section 8, appellant drilled a well in the NW 1/4 in the spring of 1976. One well driller drilled a well down to the basalt surface and stopped because his equipment was not capable of penetrating the basalt. It took appellant another year to find a well driller to drill into the basalt. The total cost to appellant for this hole was about \$23,500 and produced no tangible results. Another well has been started in a different part of the quarter section and has cost the appellant about \$7,000 thus far. No agricultural use of the property is now evident.

IV

On March 13, 1978, respondent notified appellant that each of the five permits would be cancelled unless "good cause" was shown

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1 why the permits should not be cancelled. Appellant's reply was not
2 deemed good cause by the respondent because appellant had not met the
3 development schedule expected by respondent. An order cancelling
4 each permit was thereafter issued and appealed to this Board.

5 V

6 Appellant believes that irregularities in the basalt surface
7 below its property are responsible for its not finding water within
8 200 feet into the basalt, which is the limitation as to the depth that
9 appellant can drill. Nevertheless, appellant seeks to retain its
10 permits and believes that an extension of six months will be
11 adequate for it to drill yet more wells.

12 VI

13 Any Conclusion of Law which should be deemed a Finding of Fact
14 is hereby adopted as such.

15 From these Findings the Board comes to these

16 CONCLUSIONS OF LAW

17 I

18 With all of the available water allocated to a group of permit
19 holders in the Quincy Subarea, respondent's actions reflect a policy
20 which encourages prompt development of a limited quantity of water.
21 Consistent with this policy, a large majority of permit holders have
22 met the development schedule which is common to each permit. Over 250
23 applications for the limited quantity of water are pending and must continue
24 to be held in abeyance until water is available. By failing to timely
25 develop a well, a permit holder delays development of farmland and
26 deprives another person from doing so.

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1 In this matter, respondent seeks to cancel appellant's five permits
2 because appellant has not shown it good cause for an extension of the
3 development schedule in the permit. RCW 90.03.320, made applicable to
4 ground water by RCW 90.44.060, provides that:

5 Actual construction work shall be commenced
6 on any project for which permit has been granted
7 within such reasonable time as shall be prescribed
8 by the supervisor of water resources, and shall
9 thereafter be prosecuted with diligence and
10 completed within the time prescribed by the
11 supervisor. The supervisor, in fixing the
12 time for the commencement of the work, or for
13 the completion thereof and the application of
14 the water to the beneficial use prescribed in the
15 permit, shall take into consideration the cost
16 and magnitude of the project and the engineering
17 and physical features to be encountered, and
18 shall allow such time as shall be reasonable
19 and just under the conditions then existing,
20 having due regard for the public welfare and
21 public interests affected: and, for good cause
22 shown, he shall extend the time or times fixed
23 as aforesaid, and shall grant such further
24 period or periods as may be reasonably neces-
25 sary, having due regard to the good faith of
26 the applicant and the public interests affected.
27 If the terms of the permit or extension thereof,
are not complied with the supervisor shall
give notice by registered mail that such permit
will be canceled unless the holders thereof
shall show cause within sixty days why the same
should not be so canceled. If cause be not shown,
said permit shall be canceled. (Emphasis added.)

20 We conclude that respondent has set a reasonable period of time
21 generally applicable to the Quincy Subarea to develop wells and
22 place water to beneficial uses. The large majority of permit holders
23 have met the development schedule. For these permit holders who
24 have not done so, respondent "shall grant" further periods having
25 due regard to the "good faith of the applicant and the public interest
26 affected." Appellant has spent substantial sums of money in its

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futile attempts to develop the water resource. Additionally, appellant's efforts are consistent with respondent's policy to develop the resource and an extension of time would not detrimentally affect the public interest. A permit does not guarantee that water will be found. If it did so, respondent's standard for permittees to have a well developed and water applied to a beneficial use within three years without exception would seem more reasonable. Without such guarantee, the standard, while it may be generally valid, may be unduly harsh in particular situations. To avoid the harsh effect of such standard, the circumstances which prevented the permittee from meeting the development schedule should be considered, in addition to that which was considered by respondent: that the development schedule was not met and that other persons are waiting for an opportunity to drill for water. " accept respondent's practice would give no effect to RCW 90.03.320 which provides for extensions of time for development "having due regard to the good faith of the applicant and the public interests affected," since respondent requires that development be essentially completed to show "good cause." We conclude that appellant has shown good cause for an extension of its permits. Accordingly, respondent's orders of cancellation should be reversed and the matter remanded for extension of the development schedule in each permit for a six month period.

II

Appellant's request that this Board formulate a decision which goes beyond the orders here appealed is without statutory authority.

III

Any Finding of Fact which should be deemed a Conclusion of Law

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1 is hereby adopted as such.

2 From these Conclusions the Board enters this

3 ORDER

4 The Orders of Cancellation in each of the permits are reversed
5 and the matter is remanded for an extension of the development schedule
6 in each permit for a period of six months from the date that this order
7 becomes final.

8 DATED this 4th day of December, 1978.

9 POLLUTION CONTROL HEARINGS BOARD

10 
11 DAVE J. MOONEY, Chairman

12 
CHRIS SMITH, Member

14 
15 DAVID AKANA, Member

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